

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

Deandre Michael Howard,

Case No.: 2:22-cv-1004-JAD-MDC

Plaintiff

V.

United States of America,

## Defendant

## **Findings of Fact, Conclusions of Law, and Judgment Following Bench Trial**

[ECF No. 104]

This Federal Tort Claims Act (FTCA) case arises out of a June 29, 2020, car accident

10 between Plaintiff Deandre Michael Howard and Federal Bureau of Investigation (FBI)

11 Agent Mark Neira. The case proceeded to a bench trial on Howard's negligence claim on May

12 19, 2025. Having considered the trial evidence, the parties' stipulations, and counsel's closing  
13 arguments, I find in favor of Plaintiff Deandre Michael Howard in the amount of \$136,176.13.

14 || Analysis

## Analysis

**A. Howard has proven his negligence claim.**

16 As the Ninth Circuit held in *Taylor v. United States*, “state substantive law governs in  
17 suits brought under the FTCA.”<sup>1</sup> “It is well established that to prevail on a negligence claim [in  
18 Nevada], a plaintiff must establish four elements: (1) the existence of a duty of care, (2) breach  
19 of that duty, (3) legal causation, and (4) damages.”<sup>2</sup> Howard has established all of these  
20 elements by a preponderance of the evidence.

<sup>23</sup> <sup>1</sup> *Taylor v. United States*, 821 F.2d 1428, 1432 (9th Cir. 1987).

<sup>2</sup> *Sanchez v. Wal-Mart Stores, Inc.*, 221 P.3d 1276, 1280 (Nev. 2009).

1        **1.        Duty and breach**

2        As the defense conceded in its trial brief, “[t]he elements of duty and breach are not  
 3 disputed in this case.”<sup>3</sup> It acknowledges that Agent Neira “owed a duty to exercise reasonable  
 4 care when driving behind Howard” and “breached this duty when he rear-ended Howard’s  
 5 vehicle.”<sup>4</sup> Agent Neira’s trial testimony confirmed that he was speeding and distracted at the  
 6 time of the collision, and though he applied the brakes, he didn’t do so in time to prevent the  
 7 collision. So the elements of duty and breach are established by a preponderance of the  
 8 evidence.

9        **2.        Contributory negligence**

10        But the government has also asserted contributory negligence as an affirmative defense.  
 11 It theorizes that Howard breached his “duty to not drive his car in an unsafe condition” because  
 12 the brake lights and turn signal on his classic Ford Mustang were not engaged at the time of the  
 13 collision.<sup>5</sup> As the Nevada Supreme Court has explained it, “[c]ontributory negligence is conduct  
 14 on the part of the plaintiff which falls below the standard to which he should conform for his  
 15 own protection, and which is a legally contributing cause,” alongside the defendant’s negligence,  
 16 “in bringing about the plaintiff’s harm.”<sup>6</sup> “In a defense of contributory negligence, the defendant  
 17 is not saying that it was not the cause of the plaintiff’s injuries. Rather, the defendant is saying  
 18 that even though the plaintiff can prove its *prima facie* case of negligence, the plaintiff too had a

19  
 20  
 21<sup>3</sup> ECF No. 91 at 6.

22<sup>4</sup> *Id.* at 7.

23<sup>5</sup> *Id.*

<sup>6</sup> *Natapu v. Caterpillar, Inc.*, 562 P.3d 224 (Nev. 2025) (quoting Restatement (Second) of Torts  
 § 463 (Am. Law Inst. 1965)).

1 duty that it breached, and the plaintiff was also the cause of its injuries.”<sup>7</sup> A contributory-  
 2 negligence defense must be proven by a preponderance of the evidence.<sup>8</sup>

3 There is some evidence that Howard’s taillights were not engaged. The report prepared  
 4 by an FBI internal investigator after meeting with Agent Neira recounts that Howard’s vehicle  
 5 “did not appear to have brake lights or a tur signal engaged.”<sup>9</sup> But at trial, Agent Neira could not  
 6 recall whether he saw Howard’s brake lights or turn signal, and he admitted that his inattention  
 7 was the cause of the collision. Howard testified at trial that everything on his car was  
 8 operational, including the indicator lights—a fact he took great pride in. And a post-accident  
 9 photo of the Mustang depicts that the center brake light was illuminated and thus operational.<sup>10</sup>  
 10 So I do not find that a preponderance of the evidence supports the government’s contributory  
 11 negligence defense.

12 **3. Causation and damages**

13 “It is a well-settled principle of tort law that when a defendant’s negligence causes an  
 14 injury to a plaintiff, the defendant is liable for the resulting damage to the plaintiff, even though  
 15 the plaintiff had a preexisting condition that made him more susceptible to injury or made the  
 16 consequences to him more severe.”<sup>11</sup> This principle is commonly known as the “eggshell  
 17 plaintiff” rule.<sup>12</sup> “In cases where the plaintiff has a pre-existing condition and then suffers injury

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18 <sup>7</sup> *Clark Cnty. Sch. Dist. v. Richardson Const., Inc.*, 168 P.3d 87, 96 n. 26 (Nev. 2007).

19 <sup>8</sup> *Smith v. Odd Fellows Bldg. Assn*, 205 P. 796, 798 (Nev. 1922) (“[C]ontributory negligence is  
 20 an affirmative defense [that] must ordinarily be specially pleaded and proved by a preponderance  
 of the evidence.”).

21 <sup>9</sup> EXH 506 (US0054).

22 <sup>10</sup> EXH 501 (PLTF470).

23 <sup>11</sup> *Jordan v. Atchison, Topeka & Santa Fe Ry. Co.*, 934 F.2d 225, 228–29 (9th Cir. 1991).

<sup>12</sup> See, e.g., *Gibson v. Cnty. of Washoe, Nev.*, 290 F.3d 1175, 1192 (9th Cir. 2002), overruled on  
 other grounds by *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016)).

1 to that same area, it is the plaintiff's initial burden to prove that the accident was a cause of the  
2 plaintiff's claimed injury.”<sup>13</sup>

3 When Howard set out on the road in his Mustang on June 29, 2020, he was an eggshell  
4 plaintiff, the evidence at trial overwhelmingly showed. He was fully disabled from a workplace  
5 accident in 2003 in which a forklift crushed him against a pile of gravel, leaving him with broken  
6 bones, damaged tissue, and injuries to most of his spine. Howard had undergone six back  
7 surgeries and a right-shoulder surgery, spent years under a pain-management specialist, and was  
8 on a constant regimen of opioids, anticonvulsants, and muscle relaxers. He had chronic bilateral  
9 leg numbness and tingling. He was candid about this pre-existing condition at trial, explaining  
10 that although he was able to function and tolerate it, the pain was constant, he had muscle  
11 spasms, and he was always aware of the pain.

12 Howard claims that this car accident left him with two new injuries: a back injury that  
13 caused radiating, sciatica nerve pain down his right leg, and a hurt left shoulder. He testified that  
14 the addition of these new conditions on top of his pre-existing ones from the 2003 workplace  
15 injury has negatively impacted his life, causing him to become a recluse and making him  
16 reluctant to engage with his family. Though he declined medical treatment at the accident scene,  
17 Howard went to the Valley Hospital emergency room the next day complaining of these new  
18 pains, and he immediately hired a lawyer who referred him to several new medical providers,  
19 where he racked up tens of thousands of dollars in medical bills. At trial, Howard presented the  
20 testimony of an orthopedic spine surgeon, Dr. George Elkanich, who opined that the sciatic leg  
21 pain and right shoulder pain were from injuries caused by the car accident and further opined in a  
22 very general way that all of Howard's post-accident medical treatment and the charges for it

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13 *Valentine v. State Farm Mut. Auto. Ins. Co.*, 105 F. Supp. 3d 1176, 1182 (D. Nev. 2015).

1 were reasonable and customary. He asks for his past medical expenses plus an award of  
2 \$150,000 for his pain and suffering; he is not seeking future medical expenses.<sup>14</sup>

3       The government takes the position that Howard suffered no new injuries at all from this  
4 crash; at most he had some soft-tissue injuries that would have resolved without treatment within  
5 a few weeks' time. It presented the testimony of orthopedic spine surgeon Dr. Benjamin Bjerke,  
6 who found no objective evidence of a new back injury from the accident in Howard's extensive  
7 medical records, films, and studies. He concluded to a reasonable degree of medical certainty  
8 that Howard didn't experience any permanent back injury from the crash lasting more than about  
9 a month, so any pain and suffering beyond that is related to Howard's extensive pre-existing  
10 condition.

11       The government also offered the opinion<sup>15</sup> of orthopedic shoulder surgeon Dr. Adam  
12 Lorenzetti, who testified that Howard's medical records reflect that the shoulder injury he  
13 suffered was merely a strain, and there are no signs of a traumatically induced injury. Lorenzetti  
14 opined that it was reasonable for Howard to visit Valley Hospital after the accident and to  
15 undergo four to six weeks of physical therapy to resolve this mild, soft-tissue injury. But he  
16 testified that the pain-management procedures that Howard underwent for the shoulder were not  
17 reasonably indicated for this injury, and more likely than not, his pain condition was caused by  
18 degenerative changes and age, and not the accident. Howard presented no contradictory medical  
19 opinion on the shoulder issues.

20  
21  
22<sup>14</sup> See ECF No. 100 (stipulating that “[p]laintiff will not be seeking future medical treatment at  
23 trial”).

<sup>15</sup> The parties stipulated that all of these expert witnesses are qualified to provide opinions in  
their fields.

1 I find by a preponderance of the evidence that the car crash caused Howard to suffer new  
 2 conditions of sciatica pain and a shoulder sprain. The crash was not a minor one. Although  
 3 Howard's vehicle showed little damage, Howard persuasively noted at trial that this classic  
 4 Mustang was made of steel, and Agent Neira's cruiser sustained far more damage. As Neira  
 5 testified at trial, it was "essentially totaled." The condition of the vehicles is strong evidence that  
 6 the force of the crash was significant.

7 While I credit the testimony of Dr. Bjerke that Howard's medical imaging does not show  
 8 a physical change in the condition of his spine as a result of the accident, I also credit the  
 9 testimony of Dr. Elkanich that Howard experienced a worsening of his pre-existing back  
 10 condition that created this new sciatica pain problem. And because Dr. Elkanich's testimony  
 11 about the reasonableness of the extent and cost of the back and sciatica treatment is not  
 12 contradicted, I find that Howard is entitled to recover the cost of the bills related to that injury.

13 But I also find that Howard's shoulder injury was not as extensive as he claims or treated  
 14 for. I credit the testimony of Dr. Lorenzetti that the shoulder injury was a mere strain that would  
 15 have resolved within six weeks at the latest. Shoulder strain was the diagnosis that Howard  
 16 received at Valley Hospital the day after the crash, and Dr. Lorenzetti persuasively demonstrated  
 17 that the MRIs of Howard's shoulder showed no traumatic injury. So I find that the only bills for  
 18 shoulder-related treatment that Howard is entitled to recover are those incurred through the first  
 19 six weeks after the accident, or through August 9, 2020.

20 These findings and conclusions result in the following adjustments to the billing amounts  
 21 that plaintiff claims:

Provider	Amount stated at trial	Trial exhibit	Adjusted amount	Reason for adjustment
Valley Hospital	5,754.00	EXH 3	5,754.00	n/a

Provider	Amount stated at trial	Trial exhibit	Adjusted amount	Reason for adjustment
Shadow Emergency Physicians	1,957.00	EXH 4	1,957.00	n/a
Bone and Joint Specialists	2,460.00	EXH 5	1,460.00	\$1,000 charge for surgery-cost letter is a litigation expense, not treatment, so disallowed
Center for Wellness	30,818.43	EXH 6	25,769.63	disallowed charges for 11/12/20 and 3/3/21 shoulder procedures and related follow-up appointments [PLTF139]
ZK Outpatient Rehabilitation	9,035.00	EXH 7	4,832.50	disallowed 50% of charges after 8/9/20 due to shoulder findings
Desert Radiology	245.00	EXH 8	245.00	n/a
Durango Outpatient Surgery Center	38,608.00	EXH 509a	33,983.00	\$4,625 bill for 3/3/21 shoulder nerve ablation disallowed [US0953, US1089]
LV Radiology		EXH 509a		
Dr. Garber	1,525.00	EXH 512	1,525.00	n/a
Dr. Schneier	650.00	EXH 517	650.00	n/a
	<b>TOTAL past medical expenses</b>		<b>76,176.13</b>	

I also find that Howard credibly established that he has experienced pain and suffering for these injuries that I find were caused by the car accident. The testimony at trial was that Howard treated for injuries for about ten months after the crash. He was honest about the fact that he had persistent, chronic pain before the accident, and he was able to explain how the new pains from the accident impacted him. But I find that a preponderance of the evidence shows that the increase in his pain condition was more significant only in the few months immediately following the crash.<sup>16</sup> By early October 2020, Howard was reporting to his physical therapist

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<sup>16</sup> This finding is supported by the testimony of doctors Bjerke and Lorenzetti primarily, along with Howard's own descriptions of his pain conditions that are found in the physical-therapy records at Exhibit 7.

1 that his back was “not worse than it was at baseline before the accident,” and though his shoulder  
 2 was “still bothering” him, it was “only an ache” and he was “not limited in movement.”<sup>17</sup> So I  
 3 conclude that Howard is entitled to an award of \$60,000 for his pain and suffering caused by the  
 4 negligence of the agent, for a total damages award to the plaintiff of \$136,176.13.

5 **B. The defense’s motion for fees and costs of continuing trial is denied without prejudice.**

6 Trial of this case was originally set for February 4, 2025.<sup>18</sup> The day before that trial was  
 7 scheduled to commence, plaintiff’s counsel Anthony Ashby, Esq. filed an emergency motion for  
 8 a trial continuance, explaining that he had suffered a traumatic head injury and was incapable of  
 9 trying the case the next day.<sup>19</sup> Finding Mr. Ashby’s excuse credible, I granted the motion and  
 10 continued the trial.<sup>20</sup> Defense counsel, who are Assistant U. S. Attorneys working at the U.S.  
 11 Attorney’s Office in the District of Nevada, move for fees and costs related to that continuance.  
 12 They seek fees of about \$13,505 for their own trial-preparation time, plus \$37,240 in fees and  
 13 expenses related to their two experts’ preparation and travel, for a total of \$50,745.72.

14 I find that fairness supports an award of some reimbursement for some expenses that  
 15 could not be recouped or repurposed as a result of this eleventh hour continuance. Mr. Ashby  
 16 graciously offered to pay such expenses in exchange for a stipulated continuance; ultimately he  
 17 filed a motion, which the government verbally opposed. The last-minute continuance inevitably  
 18 resulted in some wasted trial-preparation time and expenditures, and reimbursement of those  
 19 reasonable expenditures is warranted.

20  
 21 <sup>17</sup> EXH 7 (record dated 10/05/2020).

22 <sup>18</sup> ECF No. 101.

23 <sup>19</sup> ECF No. 102.

<sup>20</sup> The attorneys from Mr. Ashby’s firm who took over this case after the trial continuance represented to the court that Mr. Ashby has not returned to his law practice.

1 But the amounts that defense counsel seeks are grossly excessive and illogical. First, I  
2 cannot conclude that the work itemized in the motion could not be useful in the ultimate trial of  
3 this case. And second, while the defense seeks reimbursement for the experts' travel time to Las  
4 Vegas for their testimony and their scheduled flights and lodging, it is not clear from the motion  
5 that any of those expenses were actually incurred and not able to be credited toward the  
6 testimony or travel accommodations for the experts' ultimate trips to the continued trial. So I  
7 deny the motion without prejudice to defense counsel's ability to renew its motion within 10  
8 days with better support demonstrating what charges and expenditures were truly lost as a result  
9 of the continuance.

## Conclusion

11 IT IS THEREFORE ORDERED that the Court finds in favor of Plaintiff Deandrea  
12 Michael Howard and against the Defendant the United States in the amount of **\$76,176.13 in**  
13 **past medical expenses, plus \$60,000 for pain and suffering, for a total damages award of**  
14 **\$136,176.13.** And with good cause appearing and no reason to delay, the Clerk of Court is  
15 directed to **ENTER JUDGMENT** accordingly and **CLOSE THIS CASE.**

16 IT IS FURTHER ORDERED that the Federal Defendant's Motion for Costs and Fees  
17 Related to Continuance of Trial [ECF No. 104] is **DENIED** without prejudice to the defendant's  
18 ability to file a revised motion for such relief within the next 10 days that addresses the  
19 deficiencies and concerns above.

U.S. District Judge Jennifer A. Dorsey  
May 23, 2025